United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1106

To be argued by
PATRICIA M. HYNES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1106

Bps

UNITED STATES OF AMERICA,
Appellee,

—v.—

HAROLD NISNEWITZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1106

UNITED STATES OF AMERICA,

Appellee,

—v.—

HAROLD NISNEWITZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Nisnewitz appeals from the denial of a motion for a new trial, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure, entered on November 23, 1976, in the United States District Court for the Southern District of New York by the Honorable Richard Owen, United States District Judge.

Indictment 74 Cr. 96, filed January 30, 1974, charged Nisnewitz in seven counts with making, aiding in making, and conspiring to make false statements in loan applications submitted to federally insured banks for the purpose of influencing the action of the banks in violation of Title 18, United States Code, Sections 1014, 371 and 2. In addition to Nisnewitz, the conspiracy count (Count 7) named Jose Ramos, Jr., a loan officer at First National City Bank, and Thomas La Morte, a loan

officer at the National Bank of North America, as defendants. Four other individuals, Natalie V. Prenclau, Roger La Ferla, Gustavo Ramirez, and Johnny A. Rodriguez, the loan applicants involved in Counts 1 through 6, were named as co-conspirators but not as defendants.

Trial commenced on May 1, 1974, before a jury and ended on May 10, 1974, when the jury returned a guilty verdict as to Nisnewitz on each of the seven counts in which he was charged.*

On July 11, 1974, Judge Owen sentenced Nisnewitz to prison for one year and one day concurrently on Counts 1 through 6, and to one year and one day on Count 7, to run consecutively with Counts 1 through 6. Imposition of sentence was suspended on Count 7 and Nisnewitz was placed on probation for five years. Nisnewitz appealed from the judgment of conviction entered on July 11, 1974, and, on November 11, 1974, this Court affirmed the conviction from the bench after oral argument.** Nisnewitz is now serving his sentence of probation, having completed his term of incarceration.

On November 8, 1976, Nisnewitz filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, claiming ineffective assistance of counsel at his trial. On November 18, 1976, the motion was denied by Judge Owen in a memorandum endorsement.

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* La Morte was acquitted on Count 7, the only count in which he was named. Prior to trial, Ramos pled guilty to Count 7, the sole count against him.

** *United States* v. *Nisnewitz*, Dkt. No. 74-1971 (2d Cir., Nov. 11, 1974). The judgment affirming the conviction and reflecting the mandate of this Court was entered on November 26, 1974 in the District Court.

Statement of Facts

A. The Proof at Trial

Through the testimony of Natalie V. Prenclau (Rowe), Roger La Ferla, Gustavo Ramirez and Johnny A. Rodriguez, the loan applicants involved in Counts 1 through 6 of the Indictment, the Government proved that Nisnewitz, an accountant, for a fee of $100 to $150, prepared fraudulent loan applications at his office in Queens and then sent the applicants either to bank officer (and co-defendant) Ramos at the First National City Bank at Canal Street in Manhattan or to a branch of the Manufacturers Hanover Trust Company in Queens. The evidence also established that La Morte told Ramos that Nisnewitz would contact Ramos about loan applicants (Tr. 266) and that Ramos was contacted either by Nisnewitz or La Morte before the loan applicants came to see him (Tr. 268-69, 273-74, 280) and, further, that Ramos received money when a loan application referred to him by Nisnewitz or La Morte was approved (Tr. 271-73, 277).*

The loan applicants testified that the purpose for which they had sought the loans was in order to invest in Dare To Be Great or Koscot Interplanetary, Inc., both pyramid selling programs of Glen W. Turner Enterprises, and that they had been referred to Nisnewitz by someone connected with either Dare To Be Great or Koscot. The testimony at trial developed, with minor variations, that prospective investors without sufficient funds were funneled to Nisnewitz, who for a fee of

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* "GX" refers to Government exhibits in evidence; "Tr." refers to the transcript of the trial record; "Br." refers to appellant's brief; citations preceded by "App." are to appellant's appendix.

$100 to $150, fabricated the loan applications charged in the Indictment. (GX 1-6). Although the four loan applicants admitted to furnishing personal details to Nisnewitz, they denied fabricating the false statements that Nisnewitz caused to be inserted on the forms by his wife/typist. (Tr. 218-20, 226, 236, 378, 428, 603). In addition, Ramirez testified that a false W-2 form was provided by Nisnewitz as income verification. (Tr. 64-65, 196, 218-19).* The testimony of Prenclau (Rowe), Ramirez and Rodriguez was corroborated by bank officer Ramos. (Tr. 268-82).**

Nisnewitz testified in his own behalf. He claimed that he had attempted to dissuade each potential loan applicant from investing in Koscot or Dare To Be Great. While admitting that he had completed the loan applications involved in Counts 1 through 6, Nisnewitz denied, with one exception,*** any knowledge that the information contained in the applications was false and, indeed, stated that any such information came directly from the applicants. Nisnewitz admitted charging a fee of $100 to $150 for each such application, but said that the fees were for future accounting services and had nothing to

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* All but one (Ramirez) of the applicants were unemployed at the time that the loan applications were prepared and submitted. (Tr. 53, 151-52).

** In addition to the loan applicants and co-defendant Ramos, several other witnesses testified for the Government and, in part, corroborated the testimony of others against Nisnewitz. For example, Robert and Cheryl Walther testified that they were present when La Ferla met with Nisnewitz. (Robert Walther had, in fact, paid Nisnewitz $150 for a false loan application for his own investment in Dare To Be Great. [Tr. 375]). Although neither La Ferla nor Walther had dealt with Ramos, the Walthers were able to corroborate La Ferla's account of his dealings with Nisnewitz.

*** Nisnewitz admitted on cross-examination that he knew the information with respect to La Ferla's employment was false. (Tr. 668-70).

do with his completing the loan applications—the completion of the loan applications was an accommodation to his clients. (Tr. 570, 599, 607, 612-13, 652).

B. The New Trial Motion

On November 8, 1976, Nisnewitz filed the present motion for a new trial. In this motion, he claimed (i) that he was represented by incompetent counsel at trial and that such incompetent representation now constitutes "newly discovered evidence"; (ii) that the incompetence of his court-appointed trial counsel has been proved beyond a reasonable doubt; (iii) that his application for a new trial was timely within the meaning of Rule 33; and (iv) that the District Court should hold a hearing on his motion.

C. The District Court Decision

Judge Owen, by memorandum endorsement dated November 18, 1976, stated:

> "The required demonstration of incompetence is far from established. Further, this ground of attack, even if it ever existed, should have been apparent to defendant in the period between trial and appeal. Defendant having unsuccessfully appealed and served his sentence this application is untimely. The motion is denied.
>
> So Ordered"

ARGUMENT

POINT I

The Motion Was Properly Denied as Untimely.

Rule 33 of the Federal Rules of Criminal Procedure provides that "A motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after final judgment, ... A motion for a new trial based on *any other grounds* shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." (Emphasis added). While Nisnewitz's motion was just barely timely under the two-year standard applying to claims of newly discovered evidence,* Judge Owen was unquestionably correct in concluding that Nisnewitz's present claim was not based upon "newly discovered evidence", and thus was untimely under the more strict, 7-day standard. Indeed, since the new-trial motion was based exclusively upon matters personally known to Nisnewitz during his own trial, it was not "newly discovered" at all. *Cf. United States* v. *Natelli*, Dkt. No. 76-1494, slip op. 2557, 2560 (2d Cir., March 28, 1977). Furthermore, Nisnewitz's claim in his motion papers that the claimed incompetence "only came to light upon the scrutinization of the trial transcript" (App. 17) is absurd; at the very least, any incompetence not immediately apparent to Nisnewitz must have become apparent to him during the pendency

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*This Court has determined that "final judgment" for Rule 33 purposes occurs when the mandate has issued from the Court of Appeals. *Oddo* v. *United States*, 171 F.2d 854, 858 (2d Cir. 1949); see 2 Wright, *Federal Practice and Procedure*, § 558 at 536 (1969). The mandate issued on November 20, 1974, and thus the present motion was filed two weeks short of two years later.

of the appeal when, with the aid of counsel other than his trial lawyer (and about whom no claim of incompetence is made) the transcript was "scrutinized" for the purpose of prosecuting the appeal.*

In short, the motion was properly denied as untimely.**

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* Indeed, in a letter written shortly after his conviction, Nisnewitz specifically asked for substitution of new counsel on a separate Indictment on the ground that his trial counsel was incompetent. (App. 51). Since he was specifically aware of this ground and did not raise it on appeal, he has thus barred any collateral relief. *United States* v. *Wright*, 524 F.2d 1100 (2d Cir. 1975); *United States* v. *Coke*, 404 F.2d 836 (2d Cir. 1968); *United States* v. *Sobell*, 314 F.2d 314 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963). See generally, *United States* v. *Davis*, 417 U.S. 333, 345-46 (1974); *Sunal* v. *Large*, 332 U.S. 174 (1947); *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *United States* v. *Travers*, 514 F.2d 1171, 1176 (2d Cir. 1974). This principle has been found applicable to constitutional as well as statutory claims. *Williams* v. *United States*, 334 F. Supp. 669 (S.D.N.Y.) (Weinfeld, *J.*), *aff'd* 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972). In addition, Nisnewitz's decision to wait almost two and one-half more years before making his motion indicates that the claim could not have been very important to him. *Seiller* v. *United States*, 544 F.2d 554, 568 (2d Cir. 1975).

** Even if one were to charitably deem the motion made pursuant to 28 U.S.C. § 2255, for which the statute provides no time period, but see Rule 9(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts (effective February 1, 1977), and excuse Nisnewitz's failure to raise the issue on appeal, he was, nonetheless, not entitled to relief. Since the motion was filed after Nisnewitz had served his sentence, there is serious doubt whether a § 2255 motion—which by its terms applies to one "in custody"—was available to him. While this Court in *United States* v. *Loschiavo*, *supra*, 531 F.2d at 662, noted that a convicted defendant who had served his sentence could bring a petition for *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a), such a petition is clearly governed by the discretion of the judge who hears it. Judge Owen made it very clear that he did not consider that Nisnewitz was entitled to any relief.

POINT II

Nisnewitz Has Not Demonstrated That He Was Deprived of Effective Assistance of Counsel.

Asserting various purported failures in his trial attorney's performance, Nisnewitz claims that he was deprived of his right to effective assistance of counsel, and that Judge Owen erred in not holding a hearing on these claims. This claim is meritless. Even if one were to overlook the untimeliness of Nisnewitz's motion, the record amply belies his claim of ineffectiveness of counsel.

The test for determining claims of ineffective assistance of counsel has been recently reaffirmed by this Court:

> "[I]n this circuit the standard for inadequate counsel was enunciated in *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950.) '[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.' This court has reaffirmed this standard numerous times in recent years." *

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* In *Pickenbacker*, the Court referred to the following additional cases as reaffirming the "shocking to the conscience" standard there expressed: *Lunz* v. *Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *United States* v. *Sanchez*, 483 F.2d 1052 (2d Cir. 1973), *cert. denied*, 415 U.S. 991 (1974); *United States ex*

[Footnote continued on following page]

Rickenbacker v. *Warden*, 550 F.2d 62, 65 (2d Cir. 1976).

Not one of the blunderbuss charges leveled by Nisnewitz comes close to meeting this test.* Virtually without exception, his present claims consist of *post hoc* quibbles about trial strategy during the trial and on the record.** It is, however, well settled that "tactical errors or strategic miscalculations by counsel afford no constitutional grounds for relief." *United States ex rel. Walker* v. *Henderson*, 492 F.2d 1311, 1312 (2d Cir.), *cert. denied*, 417 U.S. 972 (1974); *accord United States* v. *Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233, 236-37 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States* v. *Matclon*, 445 F.2d 1215,

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rel. Marcelin v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 109 (2d Cir.), *cert. denied*, 402 U.S. 909 (1971); *United States* v. *Katz*, 425 F.2d 928, 930-31 (2d Cir. 1970). See also, *United States* v. *Almestica*, 546 F.2d 524, 525 (2d Cir. 1976); *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 458 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Taylor*, Dkt. No. 76-1210, slip op. 2805 (2d Cir., April 13, 1977).

* Indeed, as in *Rickenbacker* v. *Warden*, *supra*, this Court need not reach the issue of whether it should re-evaluate the "mockery of justice" standard in favor of an arguably more lenient standard adopted by some other Circuits, see, e.g., *DeCoster* v. *United States*, 487 F.2d 1197 (D.C. Cir. 1973), since Nisnewitz would fail to meet even that lax standard.

** Nisnewitz did make certain factual claims that his trial lawyer "forgot" to use certain material that was "important to my defense." (App. 19). Nisnewitz not only does not relate what this material consisted of, but also has not appended an affidavit from his attorney (or an explanation for the absence of such an affidavit) as required by this Court's decisions. See, e.g., *United States* v. *Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973); *United States* v. *Santelises*, 476 F.2d 787, 790 n. 3 (2d Cir. 1973); *Grant* v. *United States*, 451 F.2d 931, 933 (2d Cir. 1971).

1218-19 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Silva*, 418 F.2d 328, 331 (2d Cir. 1969); *United States ex rel. Maselli* v. *Reincke*, 383 F.2d 129, 133 n.4 (2d Cir. 1967); *United States ex rel. Thomas* v. *Zelker*, 332 F. Supp. 595, 600 (S.D.N.Y. 1971). While it "may well be that another attorney would have resolved these problems differently and that [the defendant] would have profited from sounder advice" tactical errors do not amount to a denial of a fair trial unless the errors are "so outrageously incompetent as to shock the conscience of the court." *United States* v. *Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963).

Indeed, the record reveals that in the context of this very simple case,* trial counsel did all that could be expected of him. Even though seven separate witnesses each identified Nisnewitz as the instigator of the false

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* As the Court has noted, "the quality of legal representation cannot be abstractly measured without reference to the merits of a defendant's case." *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). As the Court has further noted, in language singularly appropriate to this case,

> "Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do. If he simply puts the prosecution to its proof and argues its burden to convince the jury beyond a reasonable doubt, the defendant may think him lacking in aggressiveness, and surely will if conviction occurs. If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past."

United States v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970).

loan applications, his counsel attempted to develop inconsistencies in those witnesses' cross-examination (Tr. 109-12, 120-32, 156-63, 183-84, [illegible], 295, 299-300, 306-07, 373-74); demonstrated that portions of the loan applications were filled in by the applicants themselves (Tr. 179-82, 199-200, 416-17); elicited various motives on the part of the witnesses to please the Government (Tr. 34, 108-09, 157); and demonstrated the extensive preparation of the witnesses by the Government (Tr. 246-60, 302-04). In addition, his lawyer summed up reasserting these various themes. (Tr. 765-86).

Nisnewitz's further claim that his lawyer improperly allowed him to testify in his own defense is similarly without merit. Not only was his testimony a virtual necessity in view of the overwhelming evidence against him, but, as this Court has noted in *United States* v. *Wisniewski*, *supra*, the determination of whether or not a defendant should take the stand is one particularly susceptible to second-guessing in the event of conviction, and a potential assertion of error will be heeded only if joined with "objective evidence of corroboratory circumstances." 478 F.2d at 285-86. Similarly unconvincing is his assertion that his attorney was poorly prepared and failed to conduct a pre-trial investigation.*

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* That only two conferences between Nisnewitz and Friedman were held prior to trial is no indication of lack of proper trial preparation. It has frequently been held that the "time consumed in oral discussion . . . is not the crucial test of the effectiveness of the assistance of counsel," *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States* v. *Bentvena*, 319 F.2d 916, 935 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *cf. United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). Furthermore, particularly under the circumstances in this case, the two conferences were in all probability more than adequate. This is obvious from Nisnewitz's present inability to allege how he was harmed or prejudiced by the limited number of conferences he had with his attorney.

In short, there is simply nothing in the record of this case or elsewhere in Nisnewitz's papers * that support his claims. It follows that Judge Owen properly denied him a hearing to air these stale and unsupported claims. As this Court has noted, "If [the defendant] were to be afforded a hearing on the allegations presented here, our trial and appellate dockets would be swollen with incompetence of counsel cases. A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence." *United States* v. *Garguilo*, *supra*, 324 F.2d at 797.

This last sentence, which this Court has recently had occasion to reaffirm, *United States* v. *Joyce*, 542 F.2d 158, 160 (2d Cir. 1976), provides an apt description for Nisnewitz and his claims.

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* Nisnewitz's reliance on Judge Owen's reduction of Friedman's CJA voucher under Title 18, U.S.C., Section 3006A is meritless, since $1000 is the maximum amount allowable in this case under Section 3006A(d)(2). Similarly, attempts to bring up alleged post-trial incompetence of Brodsky (Br. 3-4) or improper behavior of the probation officer (Br. 42) do not merit consideration on this appeal. Defendant's denial of authorship of the presentence statement (Br. 42-43) at this time is belied by Nisnewitz's letter to Judge Lasker on June 14, 1974. (App. 52). Were the facts as now alleged by Nisnewitz, the proper procedure would have been for Nisnewitz to have moved under Fed. R. Crim. P. 35 or to have brought up the issue as part of the first appeal; since he did neither, the matter is foreclosed from consideration at this time.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

CANNELIA C. MULLINS being duly sworn deposes and says that ~~xhe~~ (she) is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 1st day of June, 1977 ~~he~~ (she) served a copy of the within Brief for the United States of America by placing the same in a properly postpaid franked envelope addressed:

Mr. Harold Nisnewitz
61-48 Austin Street
Rego Park, New York 11374

And deponent further says that ~~he~~ (she) sealed the said envelope and placed the same in the mailbox for mailing at the United States Attorney's Office, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of Manhattan, City of New York.

Cannelia C. Mullins

Sworn to me before this
1 day of June 1977

LAWRENCE FARKASH
Notary Public, State of New York
No. 24-4606580
Qualified in Kings County
Commission Expires March 30, 1979